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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 JOHN C. STANDLEY, ) CASE NO. C10-5725-JLR  
08 Plaintiff, )  
09 v. ) REPORT AND RECOMMENDATION  
10 MICHAEL J. ASTRUE, Commissioner ) RE: SOCIAL SECURITY DISABILITY  
of Social Security, ) APPEAL  
11 Defendant. )  
12 \_\_\_\_\_ )

13 Plaintiff John C. Standley proceeds through counsel in his appeal of a final decision of  
14 the Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an  
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative  
17 record (AR), and all memoranda of record, the Court recommends that this matter be  
18 REMANDED for further proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1944.<sup>1</sup> He has a four-year college education and  
21 \_\_\_\_\_

22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of  
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 previously worked as a correctional officer, computer support technician, IT instructor, and  
02 telephone technical support clerk. (AR 19, 24.)

03 Plaintiff filed an application for DIB on June 15, 2004, alleging disability beginning  
04 June 1, 2004. (AR 18.) The ALJ found that he is insured for DIB through at least the date of  
05 the decision. (AR 25.) Plaintiff's application was denied at the initial level and on  
06 reconsideration. Plaintiff timely requested a hearing.

07 On December 12, 2007, ALJ Brenton L. Rogozen held a hearing, taking testimony from  
08 plaintiff, a medical expert, and a vocational expert. (AR 740-84.) On January 10, 2008, the  
09 ALJ issued a decision finding plaintiff not disabled. (AR 18-26.)

10 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
11 on July 30, 2010 (AR 5-8), making the ALJ's decision the final decision of the Commissioner.  
12 Plaintiff appealed this final decision of the Commissioner to this Court.

### 13 **JURISDICTION**

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 15 **DISCUSSION**

16 The Commissioner follows a five-step sequential evaluation process for determining  
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
18 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
19 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
20 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's  
21 back disorder, coronary artery disease, and left (non-dominant) shoulder degenerative joint

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 disease (without rotator cuff tear) severe. Step three asks whether a claimant's impairments  
02 meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or  
03 equal the criteria of a listed impairment.

04 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
05 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
06 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to  
07 perform a wide range of sedentary work, lifting and carrying ten pounds consistently, sitting for  
08 at least six hours and standing and walking for two hours cumulatively in an eight-hour  
09 workday allowing for usual breaks. He should never climb ladders, ropes, or scaffolds, or  
10 work near hazards such as at unprotected heights or close to moving, dangerous machinery, and  
11 he should avoid concentrated exposure to extreme cold temperature, wetness, vibration, and  
12 environmental toxins such as noxious fumes and chemicals. Plaintiff should no more than  
13 occasionally climb ramps or stairs, or stoop, kneel, crouch, or crawl, and he should not  
14 continually balance without an assist. He should only perform occasional reaching tasks with  
15 his left (non-dominant) upper extremity.

16 With that assessment, the ALJ found plaintiff able to perform his past relevant work of  
17 IT instructor and telephone technical support clerk. If a claimant demonstrates an inability to  
18 perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five  
19 that the claimant retains the capacity to make an adjustment to work that exists in significant  
20 levels in the national economy. Finding plaintiff not disabled at step four, the ALJ did not  
21 proceed to step five.

22 This Court's review of the ALJ's decision is limited to whether the decision is in

01 accordance with the law and the findings supported by substantial evidence in the record as a  
02 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
03 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
04 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
05 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
06 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
07 F.3d 947, 954 (9th Cir. 2002).

08 Plaintiff argues<sup>2</sup> that the ALJ failed to properly evaluate the medical evidence, erred in  
09 the evaluation of his testimony regarding his symptoms and limitations, failed to properly  
10 evaluate lay witness evidence, and overlooked some of his functional limitations in evaluating  
11 his RFC. Plaintiff argues that, therefore, the ALJ's step four finding is not supported by  
12 substantial evidence. He requests remand for an award of benefits or, alternatively, for  
13 further administrative proceedings. The Commissioner argues that the ALJ's decision is  
14 supported by substantial evidence and should be affirmed.

#### 15 Medical Opinion Evidence

16 In general, more weight should be given to the opinion of a treating physician than to a  
17 non-treating physician, and more weight to the opinion of an examining physician than to a  
18 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
19 contradicted by another physician, a treating or examining physician's opinion may be rejected  
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21 <sup>2</sup> Plaintiff's Opening Brief contains a lengthy recitation of evidence, consisting of more than  
22 half the total pages of his brief. The parties are reminded that such a recitation is unnecessary and, in  
fact, is discouraged. Rather, a discussion of the relevant facts and portions of the administrative record  
should be conducted in the context of specific assignments of error.

01 only for “clear and convincing” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,  
02 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may  
03 not be rejected without “specific and legitimate reasons’ supported by substantial evidence in  
04 the record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
05 1983)). The ALJ may reject physicians’ opinions “by setting out a detailed and thorough  
06 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
07 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,  
08 881 F.2d at 751).

09 Plaintiff assigns error to the ALJ’s evaluation of the medical evidence. Specifically,  
10 plaintiff argues the ALJ erred in failing to acknowledge the degenerative disc disease in his  
11 cervical spine, failed to mention any evidence from his treating nurse practitioner Deborah L.  
12 Chaquette or from examining physician Dr. Janna L. Friedly, and failed to fully accept the  
13 medical findings of Dr. Ryan Chew.

14 Although not directly responding to plaintiff’s assertions as to Ms. Chaquette, Dr.  
15 Friedly, or Dr. Chew, the Commissioner argues that plaintiff has not succeeded in showing  
16 error in the ALJ’s consideration of his cervical spine degenerative disc disease. Further, the  
17 Commissioner argues, any error that may have occurred was harmless, as plaintiff fails to  
18 articulate any impact on the RFC assessment.

19 The Court does not find error in the lack of reference to plaintiff’s cervical spine  
20 problems. Contrary to plaintiff’s assertion, the ALJ specifically acknowledged the cervical  
21 spine x-rays showing the presence of degenerative disc disease. (AR 20, 528.) The ALJ  
22 found that plaintiff’s severe impairments included a “back disorder,” not limiting the finding to

01 either the lumbar, thoracic, or cervical back area. A diagnosis alone is not sufficient to  
02 establish a severe impairment. 20 C.F.R. § 404.1520(c). The evidence does not establish,  
03 and plaintiff does not contend, that the degenerative disc disease in his cervical spine  
04 significantly limits his ability to work, *see Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20  
05 C.F.R. § 404.1520(c) (at step two, a claimant has the burden of making a threshold showing that  
06 a medically determinable impairment significantly limits his ability to perform basic work  
07 activities), or causes any functional limitations beyond those set forth in the ALJ's RFC, *see*  
08 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (failure to list impairment as severe at step  
09 two harmless where limitations considered at step four).

10 Further, although plaintiff summarizes Ms. Chaquette's opinions<sup>3</sup> and Dr. Friedly's  
11 June 29, 2005 examination findings, he does not point to any specific opinions the ALJ failed to  
12 consider, nor explain how the consideration of such opinions would have affected the ALJ's  
13 decision. *See Stout v. Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006)  
14 (recognizing application of harmless error in Social Security context where a "mistake was  
15 nonprejudicial to the claimant or irrelevant to the ALJ's ultimate disability conclusion.") *See*  
16 *also Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 at \*2 (E.D. Cal. Sept. 2, 2008) (citing  
17 *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996)  
18 (party who presents no explanation in support of claim of error waives issue); *Independent*  
19 *Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)).

20 Plaintiff additionally argues that the ALJ erred by failing to fully accept the medical  
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22 <sup>3</sup> Plaintiff appears to have miscited the records relating to Ms. Chaquette. (*See* Dkt. 16 at 15.)  
The only record from Ms. Chaquette consists of a report to the state DDS. (AR 304-305A.)

01 findings of Dr. Chew, who examined plaintiff on October 9, 2004. (AR 298-303.) Plaintiff  
02 cites Dr. Chew's findings of limited range of back and neck motion, a positive straight leg  
03 raising test, and "reproducible tenderness over the paraspinous region[.]" (AR 301-02.)  
04 Again, however, plaintiff fails to articulate a theory as to how the omission of these symptoms  
05 impacted the ALJ's ultimate disability conclusion beyond the ALJ's finding that plaintiff's  
06 back disorder and left shoulder degenerative joint disease were severe impairments. (AR 19.)

07 More problematic is plaintiff's argument that the ALJ failed to fully accept Dr. Chew's  
08 opinion that he needs to use an assistive device for short and long distances and on uneven  
09 terrain. (AR 302). Although the ALJ noted Dr. Chew's observation that plaintiff's "station  
10 and gait were seen as more 'stable' with the use of a cane" (AR 20), and indicated that  
11 substantial weight was given to Dr. Chew's medical opinions (AR 22), he did not include Dr.  
12 Chew's recommendation that plaintiff use an assistive device as part of the RFC or otherwise  
13 address this limitation. Plaintiff testified that he has been using a cane since 1995. (AR  
14 756-57, 767.) The vocational expert was not asked about the compatibility of the use of an  
15 assistive device with plaintiff's ability to perform the jobs of IT instructor or telephone  
16 technical support clerk. The Court finds it necessary to remand the case to allow the ALJ to  
17 address plaintiff's need to use an assistive device, such as a cane, or to explain why the  
18 requirement was not adopted. If plaintiff's RFC is amended in that regard, the ALJ may find it  
19 necessary to re-address plaintiff's ability to perform the IT instructor and telephone technical  
20 support clerk jobs.

#### 21 Credibility Determination

22 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to

01 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).  
02 *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony  
03 unreliable, an ALJ must render a credibility determination with sufficiently specific findings,  
04 supported by substantial evidence. "General findings are insufficient; rather, the ALJ must  
05 identify what testimony is not credible and what evidence undermines the claimant's  
06 complaints." *Lester*, 81 F.3d at 834. "We require the ALJ to build an accurate and logical  
07 bridge from the evidence to her conclusions so that we may afford the claimant meaningful  
08 review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003).  
09 "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness,  
10 inconsistencies either in his testimony or between his testimony and his conduct, his daily  
11 activities, his work record, and testimony from physicians and third parties concerning the  
12 nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec.*  
13 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

14 In considering a plaintiff's subjective pain testimony, "once the claimant produces  
15 objective medical evidence of an underlying impairment, an adjudicator may not reject a  
16 claimant's subjective complaints based solely on a lack of objective medical evidence to fully  
17 corroborate the alleged severity of pain." *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.  
18 1991). However, medical evidence is "still a relevant factor in determining the severity of the  
19 claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.  
20 2001). Additionally, an ALJ also appropriately considers an unexplained or inadequately  
21 explained failure to seek treatment or follow a prescribed course of treatment. *Tommasetti v.*  
22 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (ALJ permissibly inferred that the claimant's pain



01 was not as disabling as alleged “in light of the fact that he did not seek an aggressive treatment  
02 program and did not seek an alternative or more-tailored treatment program after he stopped  
03 taking an effective medication due to mild side effects.”)

04 Plaintiff argues the ALJ failed to properly evaluate his testimony regarding his  
05 symptoms and limitations. He disputes the negative inference drawn by the ALJ relating to the  
06 amendment of his disability onset date to post-date his receipt of unemployment benefits and to  
07 his receipt of early retirement benefits. He contends the ALJ applied an inappropriate “sit and  
08 squirm test” by including his observations of plaintiff during the hearing. Plaintiff argues the  
09 ALJ’s evaluation of his subjective complaints was contrary to law in finding them credible only  
10 to the extent they were supported by objective evidence. He disputes the reasonableness of the  
11 ALJ’s finding that his daily activities are inconsistent with his testimony about his limitations.  
12 Plaintiff notes the ALJ’s failure to reference his use of pain pills to relieve his symptoms, or the  
13 testimony of the medical expert finding credible his complaints of fatigue.

14 In response, the Commissioner avers that, while the ALJ found that plaintiff’s medically  
15 determinable impairments could reasonably be expected to produce some of the alleged  
16 symptoms, he reasonably found plaintiff’s statements about the intensity, persistence and  
17 limiting effects of his symptoms not fully credible. The Commissioner argues that the reasons  
18 given by the ALJ and challenged by plaintiff are all appropriate and reasonable and that, at any  
19 rate, the elimination of any one reason does not mean the ALJ’s entire credibility assessment is  
20 improper. *Bray v. Commissioner*, 554 F.3d 1219, 1227 (9th Cir. 2009).

21 The Court agrees that the ALJ properly evaluated plaintiff’s credibility. Credibility  
22 determinations are the province of the ALJ. *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)

01 The ALJ may use ordinary techniques of credibility evaluation to evaluate the claimant's  
02 testimony, and if specific, clear, and convincing reasons are provided, the decision will be  
03 upheld. *Thomas*, 278 F.3d at 960. If the ALJ's credibility finding is supported by substantial  
04 evidence in the record, we may not engage in second-guessing. *Id.*

05 Plaintiff contends the ALJ applied an impermissible objective evidence test in  
06 evaluating his testimony. However, taken in context, it is apparent the ALJ applied the correct  
07 standard:

08 Subjective complaints are considered credible only to the extent that they are  
09 supported by the evidence of record as summarized in the text of this decision.  
10 Therefore to the extent that the [plaintiff] contends that for any continuous  
11 12-month period, he was rendered completely incapable of performing even  
"sedentary" or predominately "sit-down" work with minor postural adjustment,  
the undersigned must compare these contentions to the record as a whole to  
determine the degree of credibility to be given.

12 The undersigned acknowledges that a [plaintiff]'s symptoms can sometimes  
13 suggest a greater level of severity of impairment than can be shown by the  
objective medical evidence alone.

14 (AR 23; emphasis in decision, citations omitted.)

15 This statement does not support plaintiff's contentions that the ALJ rejected his  
16 testimony solely because it was not supported by the objective evidence. Rather, the ALJ  
17 appropriately indicated that the evaluation of plaintiff's pain complaints would be evaluated  
18 "by the evidence of record[.]" C.F.R. § 404.1529(c) ("In evaluating the intensity and  
19 persistence of your symptoms, we consider all of the available evidence, including your history,  
20 the signs and laboratory findings, and statements from you, your treating or nontreating source,  
21 or other persons about how your symptoms affect you.")

22 The ALJ found that plaintiff's daily activities, including his ability to do his own

01 laundry, mow the yard, drive a motor vehicle, shop for groceries, and attend church regularly,  
02 did not support plaintiff's assertion that he was unable to sustain any work activity. (AR 23.)  
03 The ALJ reasonably found plaintiff's activities not inconsistent with a functional capacity for  
04 performing sedentary work. (AR 23.)

05       The ALJ noted that, despite plaintiff's contention of an inability to sit or stand for longer  
06 than twenty minutes or to focus or pay attention due to side effects of prescribed medications,  
07 he observed no special difficulties in either regard during the hearing. (AR 23.) Plaintiff  
08 argues that the reliance on these observations by the ALJ was inappropriate, as well as having  
09 no relevance to his abilities in a work situation. *Perminter v. Heckler*, 765 F.2d 870, 872 (9th  
10 Cir. 1985) (holding that a denial of benefits cannot be based on the ALJ's observation of  
11 claimant when his statements to the contrary are supported by objective evidence). *But see*  
12 *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (finding proper the ALJ's reliance on  
13 his observations of claimant's behavior at hearing). However, the Court does not find  
14 inappropriate the limited reliance by the ALJ on observations of plaintiff's ability to sit longer  
15 than twenty minutes and to pay attention, taken in context with the other reasons given for the  
16 ALJ's credibility assessment. *Nyman v. Heckler*, 779 F.3d 528, 531 & n.1 (9th Cir. 1985)  
17 (ALJ's personal observations did not render decision improper where decision included  
18 evaluation of claimant's testimony, stated opinions of physicians, objective medical evidence,  
19 and claimant's demeanor at hearing; also stating: "The ALJ's observation of Nyman's  
20 demeanor was relevant to his credibility and was not offered or taken as a substitute for medical  
21 diagnosis.")

22       Plaintiff disputes the validity of the ALJ's finding that he "takes little in the way of

01 potent prescribed pain medication” (AR 24), noting his testimony at hearing that he has taken  
02 thirty milligrams of codeine “generally every four to six hours” for the last two years. (AR  
03 219, 753.) It is unclear whether the ALJ overlooked this testimony in relying on the lack of  
04 pain medication taken by plaintiff. Since the matter is being remanded on other grounds, the  
05 ALJ should clarify this point. The Court finds no error, however, in the ALJ’s finding that  
06 plaintiff’s testimony about fatigue and the need to lie down every afternoon (AR 765) were not  
07 mentioned in the medical records. While plaintiff asserts that the medical expert testified that  
08 his complaints of fatigue were credible, it was the lack of plaintiff’s mention of these  
09 complaints to his doctor that the ALJ found to negatively impact the credibility of his  
10 testimony. (AR 24.) Nor did the ALJ reject plaintiff’s testimony because his conditions were  
11 stable, as plaintiff asserts. Although the ALJ noted the relevant findings of diagnostic studies  
12 (AR 24), the decision does not indicate he drew a negative connotation from the stability of  
13 plaintiff’s conditions.

14 Plaintiff testified that for one year after he last worked in May 2003, he received  
15 unemployment benefits, was actively looking for work in the IT field, and would have taken a  
16 job if it had been offered to him. (AR 749.) His application for social security benefits  
17 alleged that he was disabled from work beginning May 23, 2003. (AR 92.) At the conclusion  
18 of the December 2007 administrative hearing, plaintiff’s attorney moved to amend the alleged  
19 onset date to June 1, 2004. (AR 782.) The ALJ’s reliance on plaintiff’s filing for  
20 unemployment benefits as adversely reflecting on his credibility is supported by substantial  
21 evidence in the record.

22 Less convincing is the ALJ’s reliance on plaintiff’s acceptance of early retirement in

01 evaluating plaintiff's credibility. (AR 23 ("The claimant reports that he has already accepted  
02 early retirement, which certainly suggests to the undersigned a somewhat less than motivated  
03 attitude concerning the seeking of gainful employment.")) Plaintiff testified that he cashed in  
04 his pension to pay off a second mortgage. (AR 752.) On this record, the Court does not find  
05 this basis for the ALJ's credibility finding supported by substantial evidence. However, the  
06 other reasons given by the ALJ supporting the adverse credibility finding provide substantial  
07 evidence support, rendering the error in relation to retirement harmless. *See Batson v.*  
08 *Comm'r*, 359 F.3d 1190, 1197 (9th Cir. 2004).

#### 09 Lay Testimony

10 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
11 to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).  
12 The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each  
13 witness. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996) (finding rejection of  
14 testimony of family members because, *inter alia*, they were "understandably advocates, and  
15 biased" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and  
16 therefore [did] not qualify as a reason germane to each individual who testified.") (citing  
17 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)). *Accord Lewis v. Apfel*, 236 F.3d 503,  
18 511 (9th Cir. 2001) ("[L]ay testimony as to a claimant's symptoms is competent evidence that  
19 an ALJ must take into account, unless he or she expressly determines to disregard such  
20 testimony and gives reasons germane to each witness for doing so.") "[W]here the ALJ's error  
21 lies in a failure to properly discuss competent lay testimony favorable to the claimant, a  
22 reviewing court cannot consider the error harmless unless it can confidently conclude that no

01 reasonable ALJ, when fully crediting the testimony, could have reached a different disability  
02 determination.” *Stout*, 454 F.3d at 1056.

03 Although the Commissioner argues that the ALJ properly discussed the lay witness  
04 testimony, this Court agrees with plaintiff that, although the ALJ briefly mentioned the  
05 statements of his landlady (Ms. Lunsford) and his wife (Ms. Fontaine), he neither explained the  
06 weight accorded them, nor provide any explanation for rejecting them. Therefore, on remand,  
07 the ALJ should consider the lay witness statements and give legally sufficient reasons for the  
08 weight accorded them.

#### 09 RFC and Step Four Finding

10 At step four, the ALJ must identify plaintiff’s functional limitations or restrictions.  
11 *See* 20 C.F.R. § 404.1545; SSR 96-8p. RFC is the most a claimant can do considering his or  
12 her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of  
13 all of plaintiff’s impairments, including those that are not severe, in determining his RFC. §§  
14 404.1545(e); SSR 96-8p. *See also Erickson v. Shalala*, 9 F.3d 813, 818 (9th Cir. 1993) (“The  
15 ALJ must consider all factors that might have a ‘significant impact on an individual’s ability to  
16 work.’”) (quoting *Varney v. Secretary of HHS*, 846 F.2d 581, 585 (9th Cir.), relief modified,  
17 859 F.2d 1396 (1988)).

18 Plaintiff argues that the errors in the ALJ’s consideration of the medical evidence, the  
19 lay witness statements, and his credibility impacted the RFC assessment. Further, plaintiff  
20 contends the ALJ failed to consider certain specific limitations such as his need to change  
21 positions at will, to take naps in the afternoon, to use a cane at all times, and his inability to type.

22 As discussed previously, the Court does not find reversible error in the ALJ’s

01 consideration of plaintiff's credibility or the medical testimony, with the exception of the need  
02 to consider the opinion of Dr. Chew as to use of an assistive device. Further consideration of  
03 the lay witness statements may also affect the consideration of the limitations opined by those  
04 witnesses. The ALJ should also address plaintiff's testimony that his ability to type has been  
05 adversely affected by the numbness in his hands (AR 761), as the ALJ did not specifically  
06 address this issue in the decision. If the ALJ's consideration of this evidence changes the  
07 assessment of plaintiff's RFC, the ALJ should consider the compatibility of the RFC finding  
08 with plaintiff's ability to perform his past relevant work.

09 Remand

10 The Court has discretion to remand for further proceedings or to award benefits.  
11 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of  
12 benefits where the record has been fully developed and further administrative proceedings  
13 would serve no useful purpose. *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002).  
14 Such a circumstance arises when: (1) the ALJ failed to provide legally sufficient reasons for  
15 rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved  
16 before a determination of disability can be made; and (3) it is clear from the record the ALJ  
17 would be required to find the claimant disabled if he considered the claimant's evidence. *Id.* at  
18 1076-77.

19 Here, it is not clear from the record that the ALJ would be required to find plaintiff  
20 disabled if the evidence described herein was properly considered. Therefore, the Court finds  
21 the proper remedy to be remand for further proceedings.

22 ///

01 **CONCLUSION**

02 For the reasons set forth above, this matter should be REMANDED for further  
03 proceedings consistent with this Report and Recommendation.

04 DATED this 20th day of June, 2011.

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07 Mary Alice Theiler  
08 United States Magistrate Judge  
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